No. 09-689

Supreme Court, U.S.
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In The
Supreme Court of the United States

MARK J. HUNSBERGER; CHERYL A. HUNSBERGER,

Petitioners,

v.

J. A. WOOD, Deputy Sheriff, Botetourt County Sheriff's Office,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR REHEARING

Terry N. Grimes*
**Counsel of Record*
Melvin E. Williams
GRIMES & WILLIAMS, P.C.
320 Elm Avenue, S.W.
Roanoke, Virginia 24016
(540) 982-3711
tgrimes@grimesandwilliams.com
mwilliams@grimesandwilliams.com

Counsel for Petitioners *Dated: March 18, 2010*

THE LEX GROUP DC ♦ 1750 K Street N.W. ♦ Suite 475 ♦ Washington, DC 20006
(202) 955-0001 ♦ (800) 815-3791 ♦ Fax: (202) 955-0022 ♦ www.thelexgroup.com

QUESTIONS PRESENTED/INTERVENING SUBSTANTIAL OR CONTROLLING GROUNDS FOR REHEARING

I. Whether the intervening cases of *Michigan v. Fisher*, ___ U.S. ___, 130 S. Ct. 546 (December 7, 2009); *Schreiber v. Moe*, ___ F.3d ___, WL724021 (6th Cir. March 4, 2010); and *Espinosa v. San Francisco*, ___ F.3d ___, WL775891 (9th Cir. March 9, 2010), conflict with the Fourth Circuit's application of the emergency and exigent circumstances exceptions to the warrant requirement of the Fourth Amendment in this case and suggest review by this Court?

II. Whether the recent Fourth Circuit case of *Culosi v. Bullock*, ___ F.3d ___, WL610625 (4th Cir. February 22, 2010), requires this Court to find that the Court of Appeals lacked jurisdiction over Deputy Wood's interlocutory appeal of denial of summary judgment because the district court denied qualified immunity based, in part, on the presence of genuine issues of material fact?

PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

Plaintiffs/Appellants: Mark and Cheryl Hunsberger

Defendants/Appellees: J.A. Wood and William Blessard*

*William Blessard remains a party to the district court proceeding, but this appeal has no bearing on him.

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CITATIONS TO THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED BY COURTS OR ADMINISTRATIVE AGENCIES

Hunsberger v. Wood,
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ARGUMENT

Mark and Cheryl Hunsberger live in a residential neighborhood in the County of Botetourt, Virginia. They have three children, two teenage sons and a 10-year-old daughter. Late on a Friday night in February 2007, Respondent Wood, an 18-year veteran of the Botetourt County Sheriff's Office, entered and searched the Hunsberger home without a warrant while accompanied by William Blessard, a civilian. Wood's purported reason for searching the home was suspicion of vandals or burglars at the Hunsberger residence, based upon a neighbor's complaint, and/or Blessard's inability to contact his daughter via cell phone after finding her car parked in front of the Hunsberger home. The district court denied Wood's motion for summary judgment, but the Fourth Circuit reversed holding that Wood was entitled to qualified immunity.

Recent cases from this Court, and the Fourth, Sixth and Ninth Circuits constitute "intervening circumstances of a substantial or controlling effect or ... other substantial grounds not previously present" and thereby justify this Court's granting of this Petition to Rehear the Order denying the Hunsbergers' Petition for Writ of *Certiorari* as required by *Supreme Court Rule 44*.

I. The intervening cases of *Michigan v. Fisher*, ___ U.S. ___, 130 S. Ct. 546 (December 7, 2009), *Schreiber v. Moe*, ___ F.3d ___, WL724021 (6th Cir. March 4, 2010), and *Espinosa v. San Francisco*, ___ F.3d ___, WL775891 (9th Cir. March 9, 2010), conflict with the Fourth Circuit's application of the emergency and exigent circumstances exceptions to the warrant requirement of the Fourth Amendment in this case and suggest review by this Court.

The recent cases of *Michigan v. Fisher*, ___ U.S. ___, 130 S. Ct. 546 (December 7, 2009), *Schreiber v. Moe*, ___ F.3d ___, WL724021 (6th Cir. March 4, 2010), and *Espinosa v. San Francisco*, ___ F.3d ___, WL775891 (9th Cir. March 9, 2010), when compared to the Fourth Circuit's decision in *Hunsberger v. Wood*, 570 F.3d 546 (4th Cir. 2009), *reh'g and reh'g en banc den'd*, 583 F.3d 219 (4th Cir. 2009), create a conflict among this Court, the Sixth and Ninth Circuits and the Fourth Circuit. In this important area of constitutional law this Court should grant *certiorari* to ensure uniform application of Fourth Amendment protections.

This Court found in *Michigan v. Fisher* that pursuant to the emergency aid exception "law enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from *imminent* injury." *Fisher*, 130 S. Ct. at 548 (*citation and internal quotations omitted*) (*emphasis added*).

Officers in *Fisher* responded to Fisher's residence on a "complaint of a disturbance." *Id.* at 547.

> Upon their arrival, the officers found a household in considerable chaos: a pickup truck in the driveway with its front smashed, damaged fenceposts along the side of the property, and three broken house windows, the glass still on the ground outside. The officers also noticed blood on the hood of the pickup and on clothes inside of it, as well as on one of the doors to the house. (It is disputed whether they noticed this immediately upon reaching the house, but undisputed that they noticed it before the allegedly unconstitutional entry.) Through a window, the officers could see respondent, Jeremy Fisher, inside the house, screaming and throwing things. The back door was locked, and a couch had been placed to block the front door.
>
> The officers knocked, but Fisher refused to answer. They saw that Fisher had a cut on his hand, and they asked him whether he needed medical attention. Fisher ignored these questions and demanded, with accompanying profanity, that the officers go to get a search warrant. Officer Goolsby then pushed the front door partway open and ventured into the house. Through the window of the

> open door he saw Fisher pointing a long gun at him. Officer Goolsby withdrew.

Id.

In this case, and unlike *Fisher* (and unlike *Brigham City v. Stuart*, 547 U.S. 398, 126 S. Ct. 1943, 164 L. Ed. 2d 650 (2006)), Deputy Wood did not encounter a tumultuous situation, found no signs of recent injury, and saw no violent or illegal behavior occurring to buttress the 911 caller's complaint. *Id.* at 548-49. In short, Wood had no reasonable basis to believe that anyone inside the home was in need of immediate assistance, and for the Fourth Circuit to have so held conflicts with this Court's decision in *Fisher*.

Likewise the Sixth Circuit case of *Schreiber v. Moe*, ___ F.3d ___, WL724021 (6th Cir. March 4, 2010), conflicts with the Fourth Circuit's decision here. In *Schreiber* officer Moe responded to an anonymous report of a domestic disturbance involving a father and daughter.

> Moe claims that, upon arriving at Schreiber's apartment, he could hear an angry male voice yelling profanities, and Schreiber admits that he was in a "heated" discussion with Sarah. Moe proceeded to knock on the door, which was answered by a young boy around the age of ten. At this point, Moe could see Schreiber yelling at someone within the home. The parties seem to dispute, however, whether Sarah was visible to

> Moe at this point; Schreiber claims that she was, and Moe claims that she was not. Moe asked the young boy if Sarah was okay. Shortly thereafter, Schreiber came to the door, and according to Moe, Schreiber was shouting phrases such as "'what the fuck do you want'" and "'I hate the fucking police.'" According to Moe, Moe responded by explaining that he was there to check on Sarah's welfare, only to have Schreiber reply "'no, you fuckin' don't.'" Schreiber does not deny making these statements, but does claim that he asked for a warrant and also that he explicitly told Moe that Sarah was fine. Moe then entered the home before Schreiber could close the door.

Id. at *1 (*citations omitted*).

In discussing the law regarding exigent circumstances, the Sixth Circuit, citing *Fisher*, *supra*, stated that,

> "officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." *Fisher*, 130 S. Ct. at 548 (internal quotation marks omitted). However, there must be "an objectively reasonable basis for believing ... that a person within the house is in need of immediate aid." *Id.* (internal quotation

> marks omitted). In civil cases, this question is normally left to the jury, but only if "there is room for a difference of opinion." *See Ingram v. City of Columbus*, 185 F.3d 579, 587 (6th Cir. 1999) (internal quotation marks omitted).

Id. at *4.

Under the facts of this case, Wood had no reasonable basis to believe that "a person within the house [was] in need of *immediate* aid." *Id.* (*internal quotations omitted*) (*emphasis added*). The Fourth Circuit's holding in this case eliminates the requirement that an imminent emergency exist, and is in conflict with the recent (and historic) holdings of this Court and the other Circuit Courts of Appeal.

Next, the case of *Espinosa v. San Francisco*, ___ F.3d ___, WL775891 (9th Cir. March 9, 2010), is in conflict with the Fourth Circuit's decision here. In *Espinosa* the Ninth Circuit upheld denial of qualified immunity in the warrantless entry of an apartment where a "neighbor stated that the front door of the apartment was swinging open and that the location could be a drug house." *Id.* at *1. Upon arrival police officers found the front door closed, but could slightly open it with a push, and saw several items inside when looking through the windows. *Id.* The officers understood that the apartment was supposed to be vacant. *Id.* at *3. In the course of the officers' search they shot and killed a person legally present in the apartment. *Id.* at *1. The Ninth Circuit upheld the district court's finding that neither the

emergency nor the exigent circumstance exceptions to the warrant requirement justified the officers' entry into the apartment. *Id.* at *3. Specifically, the court found that the "evidence does not establish that [the defendant officer(s)] could have had an objectively reasonable belief that a life-threatening emergency was occurring or a crime was in progress." *Id.* Further, the court found significant that, "[t]he record also does not show that [backup officers] made inquiries about other facts which would allow a warrantless entry and search of the apartment." *Id.* at *4.

Similarly, in this case Wood lacked "an objectively reasonable belief that a life-threatening emergency was occurring or a crime was in progress" and failed to make "inquiries about other facts which would allow a warrantless entry and search." *Id.* at *3 and *4, respectively. For example, (1) when Appellant first responded to the scene, nearly two hours before his search of the home, his observations admittedly revealed nothing of suspicion, *Hunsberger*, 570 F.3d at 550; (2) Upon Wood's second trip to the home he and another deputy "shined [their] flashlights into the windows" of the home and saw nothing amiss; and (3) Wood knowingly and purposefully ignored the two Hunsberger vehicles parked at the rear of the home as evidence that someone who lived there may be home: specifically, he requested only "info for vehicles that didn't belong there" when he asked his dispatch center to contact the owners of the vehicles parked at the home. The Fourth Circuit ignored these facts and therefore, its holding is in conflict with the Ninth Circuit's holding in *Espinosa*.

In this case Wood's *post hoc* justification for searching the Hunsberger home without a warrant was to assist a civilian in locating his teenage step-daughter and/or to determine whether the Hunsberger home was being vandalized or burgled. The undisputed, objective facts in the light most favorable to the Hunsbergers failed to establish a serious imminent threat to person or property, and therefore the emergency and exigent exceptions to the warrant requirement were not met, and to hold such is in direct conflict with the recent holdings of this Court and the Sixth and Ninth Circuits.

The conflict between this Court, the Sixth and Ninth Circuits and the Fourth Circuit is an intervening and substantial ground that justifies this Court granting this Petition to Rehear and granting the underlying Petition for Writ of *Certiorari*.

II. The recent Fourth Circuit case of *Culosi v. Bullock*, ___ F.3d ___, WL610625 (4th Cir. February 22, 2010), requires this Court to find that the Court of Appeals lacked jurisdiction over Deputy Wood's interlocutory appeal of denial of summary judgment because the district court denied qualified immunity based, in part, on the presence of genuine issues of material fact.

Petitioners Mark and Cheryl Hunsberger argued before the district court and the Fourth Circuit Court of Appeals that genuine issues of material fact existed that precluded a determination

of qualified immunity and hence, summary judgment for Wood. An order denying summary judgment based on a finding that genuine issues of material fact exist is not an order subject to immediate appeal. *Culosi v. Bullock*, ___ F.3d ___, WL610625 (4th Cir. February 22, 2010), *citing Johnson v. Jones*, 515 U.S. 304, 319-20, 115 S. Ct. 2151, 132 L.Ed.2d 238 (1995).

In *Culosi* the Fourth Circuit held that the question of whether a law enforcement officer intentionally or accidentally shot a suspect in an illegal gambling investigation created a material issue of fact. *Id.* at *4. Based upon FRCiP 56(c)(2) and 28 U.S.C. § 1291, the court therefore lacked jurisdiction over the interlocutory appeal by the officer seeking summary judgment based upon qualified immunity. *Id.* The Fourth Circuit exercised judicial restraint despite the district court having "expressed deep skepticism as to whether any one or more of Plaintiffs' myriad of theories would be found persuasive by a jury." *Id.* at *5, fnte 5.

The Fourth Circuit found that it lacked jurisdiction despite that the district court never explicitly held that it denied summary judgment based upon a finding that material facts were in dispute: "the district court plainly, *even if only implicitly*, acted on the basis that there existed in this case genuine disputes of material fact and that the resolution of such disputes at trial was necessary before the legal issue of Officer Bullock's entitlement to qualified immunity could be determined," and "the district court ultimately (*if only impliedly*) concluded, the Plaintiffs have generated genuine

disputes of material, historical fact." *Id.* at *5, and *5, ftnte 5, respectively (*emphasis added*).

The Fourth Circuit did not afford Mark and Cheryl Hunsberger the same judicial restraint. The reasoning of *Culosi* applies with at least equal force to the facts of this case. Disputed facts in this case create jury issues. Nonetheless, the Fourth Circuit failed to view the facts in the light most favorable to the Hunsbergers: the panel opinion is totally devoid of any such reference to considering the evidence in the light most favorable to the non-moving parties, and it adjudicated disputed facts against the Hunsbergers. *Hunsberger v. Wood*, 570 F.3d 546, 549-52 (4th Cir. 2009), *reh'g and reh'g en banc den'd* 583 F.3d 219 (4th Cir. 2009). In short, the Fourth Circuit improperly exercised jurisdiction.

The disputed facts and conclusions that the Fourth Circuit rendered contrary to the Hunsbergers included that:

> First, the circumstances indicated the strong possibility of an unauthorized intruder in the home. Klik, the Hunsbergers' neighbor, had said that she thought the Hunsbergers were out of town. There appeared to be someone inside the home who wished to avoid contact with the police; when the officers first arrived, someone in the house turned the lights off, and then later the open door in the garage suggested that someone had fled the home while the officers were at the

> front door. Three cars not belonging to the Hunsbergers were parked in front of the house. No one came to the front door when the officers rang the doorbell, and no one answered when Wood and Blessard knocked on the basement door repeatedly. Furthermore, a vacant home in the neighborhood had recently burned down as the apparent result of unauthorized use.
>
> ...
>
> Second, there was evidence that a minor girl was in the home, given that her car was parked in front of the house. The girl's stepfather said that she was not supposed to be at the home and was exceedingly concerned for her welfare, especially given that it was the middle of the night. ... The fact that the girl was not answering her cell phone suggested the possibility that she was hurt or otherwise in need of assistance.

Hunsberger, 570 F.3d at 555. As was more fully discussed in the Hunsberger's Petition for Writ of *Certiorari* and Petition to Rehear and Rehear *En* Banc, the conclusions and the facts upon which the Fourth Circuit relied are genuinely in dispute.

As the Fourth Circuit held in *Culosi* it should have held in this case: "that the order of the district court denying qualified immunity to [defendant] is not immediately appealable because the district

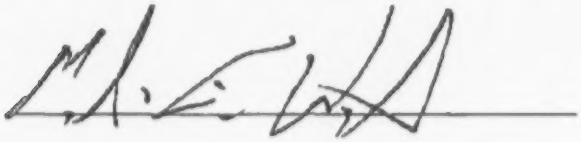
court merely determined that genuine disputes of material fact existed - a determination not subject to interlocutory appeal. *See Johnson v. Jones*, 515 U.S. 304, 319-20, 115 S.Ct. 2151, 132 L. Ed. 2d 238 (1995)." *Culosi*, 2010 WL 610625, at *1 (4th Cir. February 22, 2010).

CONCLUSION

The Fourth Circuit erroneously exercised jurisdiction by failing to acknowledge that the district court denied summary judgment based, in part, on genuine issues of material fact, in conflict with its more recent holding in *Culosi v. Bullock*. Further, the Fourth Circuit's holding in this case creates a conflict between the Fourth Circuit and this Court and the Sixth and Ninth Circuits in the application of the emergency and exigent circumstance exceptions to the warrant requirement and the intervention of this Court is necessary to resolve this conflict. In the words of the four dissenting members of the Fourth Circuit, "The panel's holding works an injustice on the Hunsbergers and creates an unsupportable and unsound precedent." *Hunsberger*, 583 F.3d 219, 228 (4th Cir. 2009).

WHEREFORE, Mark and Cheryl Hunsberger pray that the Court would grant this Petition to Rehear, grant the underlying Petition for Writ of *Certiorari*, and reverse the judgment of the Fourth Circuit.

Respectfully submitted,
MARK AND CHERYL HUNSBERGER



Of counsel

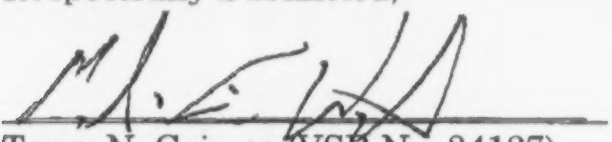
Terry N. Grimes (VSB No. 24127)
tgrimes@grimesandwilliams.com
Melvin E. Williams (VSB No. 43305)
mwilliams@grimesandwilliams.com
GRIMES & WILLIAMS, P.C.
FRANKLIN COMMONS
320 Elm Avenue, S.W.
Roanoke, Virginia 24016
540-982-3711
540-345-6572 (facsimile)

Counsel for Mark and Cheryl Hunsberger

CERTIFICATE, IN ACCORDANCE WITH RULE 44(2)

Petitioners certify that the above petition for rehearing is presented in good faith and not for any delay and is restricted to the grounds specified in Rule 44.2.

Respectfully Submitted,



Terry N. Grimes (VSB No. 24127)
tgrimes@grimesandwilliams.com
Melvin E. Williams (VSB No. 43305)
mwilliams@grimesandwilliams.com
GRIMES & WILLIAMS, P.C.
FRANKLIN COMMONS
320 Elm Avenue, S.W.
Roanoke, Virginia 24016
540-982-3711
540-345-6572 (facsimile)

Counsel for Mark and Cheryl Hunsberger